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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LANDON RYAN JOHNSON,

Defendant and Appellant.

E061692

(Super.Ct.No. RIF1314241)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Affirmed.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Alana Butler, and Stephanie H.
Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Loneise, defendant Landon Johnson's girlfriend, and her pregnant friend, Lakeisha Hillman, argued in the front seat of Loneise's car about whether Loneise should drive Lakeisha home when the latter missed her bus. Defendant told Lakeisha to get out of the car, but Lakeisha refused, so defendant forcibly pulled Lakeisha out of the car, causing her to fall on the ground. Defendant walked off as Loneise drove off, leaving Lakeisha with a cut on her pinky finger that required four stitches. Defendant was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ along with two prior serious felony convictions (§ 667, subd. (a)(1) "nickel priors"), one prior conviction for which he had served a prison term (§667.5, subd. (d), "prison prior"), and two prior serious felony convictions under the Strikes law. (§ 667, subds. (c), (e)(2), "strikes.") Defendant was convicted as charged and sentenced under the Strikes law to an aggregate term of 35 years to life. He appealed.

On appeal, defendant argues that (1) his conviction should be reversed due to the prosecutor's misconduct in closing argument equating reasonable doubt to a jigsaw puzzle with a few pieces missing, and (2) the court abused its discretion when it refused to strike one of defendant's prior strikes due to defendant's verbal outbursts after the verdict was returned. We affirm.

BACKGROUND

On December 2, 2013, Lakeisha Hillman had plans to meet up with her friend, Loneise Jackson, at which time Lakeisha would braid Loneise's hair for an upcoming job

¹ All further statutory references are to the Penal Code unless otherwise indicated.

interview. Loneise, who had her baby with her, picked up Lakeisha at approximately noon, and the two women went to eat, get Loneise's eyelashes done, and picked up the supplies Lakeisha would need to braid the hair. Then they picked up defendant, Landon Johnson, and went to a Best Western in Moreno Valley where Lakeisha, who was five and one-half to six months pregnant, did Loneise's hair while defendant took care of the baby in another room of the hotel suite. They were in the hotel room for five to six hours.

At approximately 7:50 p.m., they left the hotel room because Loneise needed to catch a bus to take her to her home in another part of the city. Loneise drove her car with Lakeisha in the front passenger seat, while defendant rode in the backseat, behind Lakeisha, with the baby. When they reached the bus stop, however, the bus had already left. Loneise pulled into the shopping center across the street from the bus terminal and parked her car in front of Donut Time, which was near the Maxi Foods grocery store.

However, Lakeisha had missed the bus, which had left at 7:00 p.m., and there were no other busses going to her neighborhood. In addition, Loneise refused to pay Lakeisha for braiding her hair. Lakeisha and Loneise argued about how Lakeisha was supposed to get home. Loneise indicated she did not have enough gas in her car to drive Lakeisha home.

At this point, defendant told Lakeisha to get out of the car. Lakeisha told defendant to shut up because the car did not belong to him. Defendant got out of the car, opened the front passenger side car door where Lakeisha was sitting, grabbed the front of

her shirt, and pulled Lakeisha out of the car, dragging her a few feet in the parking lot. Lakeisha screamed at defendant to get his hands off her because she was pregnant, and hit the ground on her bottom. Defendant stood over her and made a swiping motion in front of Lakeisha's face or neck area, which Lakeisha had shielded with her hand. Defendant then walked towards the trash receptacle at Donut Time, appeared to put something into the trash, and walked towards the back of Maxi Foods.

Lakeisha tried to get Loneise to let her into the car by hitting the trunk with her hand, but Loneise had locked the doors, tossed Lakeisha's backpack out the window, and drove off, nearly hitting Lakeisha in the process of backing up. She did not realize she had been cut at the time. A security officer at Maxi Foods heard Lakeisha yelling that she had been cut, was bleeding, and was pregnant, so he went towards Donut Time. He called for the police and went towards Lakeisha who was crying and scared. Lakeisha pointed to defendant and said that he had stabbed her. The security officer saw defendant put something in to the trash can and walk away. When police responded, they could not find any weapon in the trash receptacle.

An ambulance took Lakeisha to Riverside Community Hospital where she was treated for the laceration to her pinky finger with four sutures. Defendant was subsequently arrested at the hotel, where police found blood stains on the exterior of Loneise's car. Two days later, Lakeisha sent messages to Loneise through Facebook, threatening to beat up Loneise.

Defendant was charged with one count of assault with a deadly weapon. (§ 245, subd. (a)(1).) It was further alleged that the defendant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and that he had suffered one prison prior (§ 667.5, subd. (b)), two “nickel priors,” and two Strikes. Defendant was tried by a jury, which found him guilty of assault with a deadly weapon, but found he did not inflict great bodily injury.

Defense counsel filed a motion to strike one of the Strike allegations pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), prior to the court trial set to prove up the prior convictions. At the court trial to determine the truth of the prior convictions, all allegations were found true. The court declined to strike one of the Strike allegations due to defendant’s statements after the verdicts were received, although it had initially planned to do so. The court imposed two determinate terms of 5 years each for the nickel priors, and a consecutive indeterminate term of 25 years to life for the substantive offense. The court struck the prison prior.²

Defendant timely appealed.

DISCUSSION

1. There Was No Prosecutorial Misconduct During Rebuttal.

Defendant argues for reversal of his conviction on the ground of prosecutorial misconduct. Specifically, defendant points to the prosecutor’s reference to a jigsaw

² The court indicated the prison prior was “washed out” by the nickel priors; however, multiple punishment is precluded by *People v. Jones* (1993) 5 Cal.4th 1142.

puzzle in explaining the concept of reasonable doubt during the rebuttal portion of closing arguments, arguing that this analogy lessened the People's burden of proof. Further, defendant argues that his attorney was ineffective for failing to object to this argument, in order to avoid forfeiture of the issue. We disagree.

It is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from its *prima facie* obligation to overcome reasonable doubt on all elements. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) We refer to such transgressions as “prosecutorial error,” rather than “misconduct,” in the absence of a culpable state of mind. (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667 (*Centeno*).) When attacking a prosecutor's remarks to the jury, a defendant must show that, in the context of the whole argument and the instructions, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*Id.* at p. 667, citing *People v. Marshall, supra*, 13 Cal.4th at p. 831.)

As the opinion in *Centeno* explains, there are many examples of “innovative but ill-fated attempts to explain the reasonable doubt standard.” (*Centeno, supra*, 60 Cal.4th at p. 667.) In some of these ill-fated cases, the Supreme Court has cautioned against prosecutors' attempts to reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart (see *People v. Medina* (1995) 11 Cal.4th 694, 745), or an iconic and easily recognizable picture. (See *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266-1267.) However, the California Supreme Court stopped short of categorically disapproving the use of reasonable doubt analogies or diagrams in

argument. (*Centeno, supra*, 60 Cal.4th at p. 667.) Instead, it assesses each claim of error on a case-by-case basis. (*Ibid.*)

The People argue that the defendant forfeited the issue by failing to object to the prosecutor's argument, an argument anticipated by defendant who claims his trial counsel provided ineffective assistance. A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and requested that the jury be admonished to disregard the perceived impropriety. (*Centeno, supra*, 60 Cal.4th at p. 674, citing *People v. Lopez* (2008) 42 Cal.4th 960, 966, quoting *People v. Thornton* (2007) 41 Cal.4th 391, 454.) A failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

It was defense counsel who first suggested the metaphor of the jigsaw puzzle to the jury, when he argued, "The DA wants you to force pieces of this case together or ignore pieces of this case. A lot of times you hear DA's talk about the case being a puzzle. Well, you don't get to sit there and pound on the puzzle and say, I want that piece to fit right there, and I get to cut off little pieces of it to fit in there. You have to consider the entire case. [¶] The DA has left too many holes in this case. You are not allowed to make impermissible assumptions to fill them. That is their job. It is their job to show you evidence and proof beyond a reasonable doubt. You're not allowed to speculate."

In rebuttal, the prosecutor reminded the jury that “Beyond a reasonable doubt does not require 100 percent.” She then told the parable about working on jigsaw puzzles as a child and becoming upset that not all the pieces were there. She said, “And I remember my grandma teaching me this, and this is something I remember still to this day. She took that carton, you know, when we were done there were some pieces missing, but it is what it is, and then we would—we’d glue the back of it, and then we would flip it back over, let it dry, flip it back over and she would pick it up. So now it’s like a poster. And there is a piece missing, but she’d ask me, can you still see what it is? And you could always still see what it was. [¶] And that’s exactly what you can do when you go back to deliberate. You look at what you have, and you determine—there is only one thing that you’re look for and I’ll tell you that is what this case is about. That’s what every case is about. You’re looking for one thing. The truth. That’s it. You have been given the evidence. You have been given credible evidence and you have been given not credible evidence. You are the factfinders. You decide what happened.”

On this record, we can find no error. The prosecutor did not ask the jury to speculate, and the “misstatement” did not attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.

Moreover, defendant’s “failure” to object was the result of a tactical decision to preemptively address a familiar prosecutorial argument. By introducing the concept of the jigsaw puzzle, defense counsel was able to provide his own metaphor for reasonable doubt: pounding together pieces of a puzzle that did not fit. This was a reasonable

tactical decision, which we will not second guess. There was no ineffective assistance of counsel, so any error was forfeited.

2. *The Court Did Not Abuse Its Discretion in Denying Defendant's Romero Motion.*

On appeal, defendant argues that the trial court abused its discretion when it changed its tentative *Romero* ruling based on defendant's post-verdict conduct. We disagree.

a. *Background*

After the verdicts were read, defendant made numerous statements protesting his innocence. Again, on the date set for the court trial to prove the prior conviction allegations, and to consider defendant's *Romero* motion, defendant addressed the court, protesting his innocence as well as his attorney's alleged lack of diligence. After defendant had protested for a considerable period of time, the court informed him that before he had started talking, the tentative decision was to grant the *Romero* motion and strike one of the Strike allegations, but that based on what defendant had just said, it was reconsidering its tentative. An in camera *Marsden* hearing³ was then conducted, after which the court found true all the allegations relating to prior convictions.

Again, defendant interjected to protest his innocence, attributing his conviction to racism, as the court attempted to move on to the subject of the *Romero* motion. Nevertheless, the defendant was not dissuaded, and continued to complain out loud

³ Referring to *People v. Marsden* (1970) 2 Cal.3d 118.

despite a second warning from the court. The court then informed defendant that because of the things he had said, it had reconsidered its ruling on the *Romero* motion.

In making its ruling, the court indicated it had considered certain factors: the current crime was a serious and violent crime; the nature and number of the defendant's prior convictions, including the fact that defendant had been "pretty much" regularly in custody since 1998; the fact the current crime involved violence; the recency of defendant's priors, including violations of parole; and the fact defendant had taken no accountability for the acts of which he was convicted. The court went on to explain that given defendant's outbursts, if he were to be given a determinate term, he would constitute a danger to society, and that defendant had denied accountability for the acts. After both counsel argued, the court denied the *Romero* motion to strike.

b. *Analysis*

Section 1385, subdivision (a), authorizes a trial court to strike prior conviction allegations that would otherwise increase a defendant's sentence. (*People v. Garcia* (1999) 20 Cal.4th 490, 496.) This authority includes the power to strike allegations under the Three Strikes law. (*Romero, supra*, 13 Cal.4th at pp. 504, 529-530.) In ruling on a *Romero* motion, courts are required to consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as

though he had not previously been convicted of one or more serious and/or violent felonies. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A fair reading of the transcript of the *Romero* hearing reveals the court did consider proper criteria in ruling on the motion. It considered the violence the current offense, as well as the nature and circumstances of his prior convictions, along with defendant's character and his prospects, in determining that defendant was not outside the spirit of the Strikes law. The record supports the court's findings: the current crime was a violent felony; defendant's prior convictions included a 1998 robbery, a 2005 domestic violence, and a 2007 conviction for criminal threats, among other convictions and parole violations.

As for his background, the court found he had been in custody almost continuously since 1998. As for his character and prospects, the court found that his outbursts and failure to take responsibility for his acts rendered him a danger to society. In this respect, while the precipitating factor causing the court to reconsider its ruling was defendant's inability or refusal to control his outbursts, there were valid factors supporting a denial of the motion.

In any event, it is well settled that a tentative decision is not binding on the trial court and can be modified or changed as the judge sees fit before entry of judgment. (See *In re Marriage of Boblitt* (2014) 223 Cal.App.4th 1004, 1029-1030; *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1284.) The court announced what its tentative decision could have been and allowed counsel to argue. It was not bound by its tentative

ruling, and did not abuse its discretion where it relied on appropriate factors in denying the motion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.